

**PENBERTHY ELECTROMELT
INTERNATIONAL, INC.,**

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,**

Respondent.

**ORDER GRANTING
SUMMARY JUDGMENT
AND DISMISSAL**

This case was originally consolidated with PCHB No 93-27, in which PEI challenged an Ecology order establishing a modified cost closure plan for PEI. The Pollution Control Hearings Board ("Board"), on April 14, 1994, entered an order granting summary judgment to Ecology in PCHB No 93-27. PEI appealed that decision to the King County Superior Court. No order has been entered staying the effect of the Board's decision in that case, nor has the superior court rendered a decision on the merits of PEI's appeal.

1 The Board was comprised of Robert V. Jensen, presiding and James A. Tupper, Jr.
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3 The third member of the Board, Richard C. Kelley, recused himself.

4 PEI was represented by its President, H. Larry Penberthy, appearing pro se. Ecology
5 was represented by Assistant Attorneys General, Kathy Gerla and Thomas Morrill.

6 The Board considered the record, particularly the followings pleadings which were
7 filed in conjunction with the motion.

- 8 1) Ecology's Motion for Summary Judgment,
- 9 2) Ecology's Memorandum of Points and Authorities in support of Motion for
10 Summary Judgment.
- 11 3) Declaration of Dean D. Yasuda,
- 12 4) Penberthy's Response to Department of Ecology's Motion for Summary
Judgment, Dated June 27, 1994, and
- 13 5) Ecology's Reply to PEI's Response to Motion for Summary Judgment.

14 Having considered the argument, we rule as follows:

15 I

16 PEI does not take issue with the federal and state requirements for a cost closure
17 estimate and an adequate financial assurance mechanism. Rather, it argues that it has in fact
18 closed its facility, thereby obviating the necessity with compliance with Ecology's regulatory
19 order requiring the cost closure estimate and the adequate financial assurance mechanism.

20 II

21 PEI does not contend that it provided the cost closure plan modifications required by
22 Ecology. Instead, it appealed Ecology's ultimate modification of PEI's plan. The Board
23 has previously issued summary judgment to Ecology on this issue. Unless a court reverses the
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1 Board's decision, it is the law of the case, and binds the parties Knestis v. Unemployment
2 Comp. Division, 16 Wn 2d 577, 582-83, 134 P 2d 76 (1943)
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4 III

5 PEI was required under the cost closure plan issued by Ecology and approved by the
6 Board to provide a cost closure estimate and financial assurance mechanisms PEI has never
7 responded to Ecology's order that PEI submit these documents Rather, PEI chose to appeal
8 Ecology's order However, PEI has failed to provide any meritorious argument why
9 Ecology's October 15, 1993 order should not be affirmed
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11 IV

12 There are no genuine issues of material fact before this Board Therefore, as a matter
13 of law, we conclude that Ecology is entitled to summary judgment The defense raised by PEI
14 centers on general statements of policy in the Hazardous Management Act The Board, earlier
15 concluded that Ecology's modified closure plan for PEI's facility did not violate any statutes as
16 alleged by PEI, in its April 27, 1993 Order Granting Stay, and its April 14, 1994 Order
17 Granting Summary Judgment, on the closure plan We reach the same conclusion in this case
18 Contrary to PEI's argument, the order of Ecology is designed to implement the policy
19 statements contained in the State Hazardous Waste Management Act (RCW 70 105
20
21

22 V

23 First, PEI contends that Ecology's order violates RCW 70 105 005(3), which states
24 that
25

1 [t]he availability of safe, effective, economical, and environmentally sound facilities for
2 the management of hazardous waste is essential to protect public health and the
3 environment and to preserve the economic strength of the state

4 The ostensible purpose of the Ecology order is to implement the regulations which require
5 such facilities to provide for a safe and adequate procedure for closure. The reason for this is
6 obvious: dangerous wastes must be handled with extraordinary care for the protection of the
7 flora and the fauna, including human life. If a facility, for whatever reason is required to
8 close, there must be assurances that such closure does not allow dangerous wastes and their
9 residues to become a hazard to the environment. The law places the burden on the owners or
10 operators of such facilities to provide these assurances, in conformity with the duly adopted
11 state and federal regulations. PEI has cavalierly and consistently refused to shoulder this
12 burden
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14 VI

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16 Next, PEI asserts that Ecology's order is contrary to RCW 70.105.005(7)(c), which
17 provides that

18 Public acceptance and successful siting of needed new hazardous waste management
19 facilities depends on several factors, including

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21 (c) Recognition that all state citizens benefit from certain products whose manufacture
22 results in the generation of hazardous byproducts, and that all state citizens must,
23 therefore, share in the responsibility for finding safe and effective means to manage this
24 hazardous waste,
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1 We are unable to discern any conflict between this policy statement and Ecology's
2 order requiring that PEI provide adequate assurances, in advance of closure, that the
3 hazardous wastes and their byproducts will receive safe and effective management, when and
4 if that closure occurs. In this case, that means that the cost closure estimate and the financial
5 assurance mechanisms be adequate to ensure closure according to the approved closure plan.
6 We note that PEI has simply not refuted the proposition that its cost closure estimate and
7 financial assurance mechanism, are inadequate to implement the approved cost closure plan.
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10 VII

11 PEI's third contention is that the Ecology order contravenes RCW 70 105 130(2)(b),
12 which provides

13 (2) The power granted to the department by this section is the authority to

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16 (b) Establish standards for the safe transport, treatment, storage, and disposal of
17 dangerous wastes as may be necessary to protect human health and the environment

18 The order of Ecology is issued pursuant to and consistent with state regulations which were
19 adopted under this authority. These standards were adopted from federal regulations issued by
20 the Environmental Protection Agency ("EPA") under the Federal Resource Conservation and
21 Recovery Act, 42 USC §§ 6901 et seq. Ecology is the agency responsible for implementing
22 these federal regulations. RCW 70 105 130(1)
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VIII

PEI also contends that Ecology's order violates RCW 70 105 215 which specifically mandates that Ecology adopt regulations adopt rules for the permitting of hazardous substances treatment facilities, as follows

The legislature recognizes the need for new, modified, or expanded facilities to treat, incinerate, or otherwise process or dispose of hazardous substances safely. In order to encourage the development of such facilities, the department shall adopt rules as necessary regarding the permitting of such facilities to ensure the most expeditious permit processing possible consistent with the substantive requirements of applicable law

Ecology's order does not govern the permitting of an hazardous waste treatment facility, rather it deals with the closure requirements of a permitted facility. PEI's contention that Ecology violates the above statute is inapposite

IX

PEI further contends that Ecology's order is violative of a provision of the Public Disclosure Act which protects the sovereignty of the people. RCW 42 17 251. First, we are unaware of any appellate decision voiding any governmental action based on this policy section. In Melville v. State, 115 Wn 2d 34, 38, 793 P 2d 952 (1990), the State Supreme Court refused to find that a tort claim could be based on violation of a statutory policy statement, stating "[t]he basic principle is that 'statutory policy statements as a general rule do not give rise to enforceable rights and duties.' We do not believe, absent more specific direction from the legislature, that the above-quoted policy section of the Public Disclosure Act can serve as a basis for nullifying a specific governmental order

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Secondly, we are unconvinced that Ecology's order is contrary to the above-cited policy statement. Ecology is entrusted by the Legislature with managing various environmental programs. RCW 43.21A.020. The Public Disclosure Act was not intended to restrict the substantive power of government agencies. RCW 42.17.251 does not repeal the Legislature's broad grant of authority to Ecology.

XI

40 CFR 265.142 of Subpart H of the EPA regulations pertaining to the financial requirements for hazardous waste facilities, requires that the owner or operator have a detailed written estimate of the cost of closing the facility. It further provides that "[i]f the owner or operator has an approved closure plan, the closure cost estimate must be revised no later than 30 days after the Regional Administrator has approved the request to modify the closure plan." WAC 173-303-400(3)(c)(vi) provides that compliance with the requirements of WAC 173-303-620 will be deemed compliance with the requirements of 40 CFR 265, Subpart H.

XII

WAC 173-303-620(3)(a) requires that the owner or operator of a dangerous waste facility, "have a detailed written estimate, in current dollars, of the cost of closing the facility," in accordance with the state regulations. The estimate must be based on the period in which it would be most expensive to close the facility, the cost of hiring a third party to do

1 the work, and not incorporate any salvage value for the dangerous wastes WAC 173-303-
2 620(3)(a)(i-iii)
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4 XIII

5 The last closure cost estimates submitted by PEI, in March and October 1990, did not
6 cover the costs of effectuating the modified closure plan We conclude that these estimates
7 violate WAC 173-303-620(3)(a)
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9 XIV

10 The financial assurance mechanism chosen by PEI, in its proposed closure plans of
11 March and October 1990, was a bank account at Olympic Savings Bank Ecology pointed out
12 to PEI, in its letter of March 25, 1991, that the required revisions to PEI's closure plan, would
13 significantly increase the previous closure cost estimate Accordingly, Ecology advised PEI,
14 pursuant to WAC 173-303-629(4), that PEI was required to establish a mechanism for
15 financial assurance for facility closure The options available, under the regulation, are a
16 closure trust fund, surety bond guaranteeing payment into a closure fund, surety bond
17 guaranteeing performance of closure, closure letter of credit, closure insurance, or a financial
18 test and corporate guarantee of closure The specifics of these options are contained in 40
19 CFR 265.143 of Subpart H, which federal regulation is incorporated by reference in WAC
20 173-303-620(4) A savings account at a bank is not one of the options under the regulations
21 We therefore conclude that PEI has failed to comply with WAC 173-303-620(4)
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XV

PEI, in its response to the motion for summary judgment, for the first time alleges that Robert V Jensen, the presiding officer, should be disqualified under RCW 34 05 425(3) PEI bases its challenge on the fact that Jensen served as an assistant attorney general for Ecology for 10 years PEI then, states that Jensen, "[i]n that position was an opponent of appellants to the PCHB, and has carried this bias into his present appointment as Presiding Member PEI then cites as authority, a comment to the Code of Judicial Conduct, Canon 3(c) Canon 3(C) provides, in relevant part, as follows

- (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where
 - (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,
 - (b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it,

The Comment pertaining to this section advises

Lawyers in a governmental agency do not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection, judges formerly employed by a governmental agency, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association

During his tenure as an assistant attorney general for Ecology, from April 1971-June 1981, Mr Jensen had no contact with the attorneys representing Ecology in this case, since both of them were hired by the Attorney General, substantially subsequent to June 1981

XVI

1 The fact that a judge may have represented one party in previous and unrelated
2 litigation is not grounds for disqualification Forston Shingle Co. v. Skagland, 77 Wash 8
3 (1913), 156 U S 494 (1985) PEI has not established any reasonable basis for questioning the
4 impartiality of Board members
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6 XVII

7 PEI argues that summary judgment should be denied because a summary judgment is
8 not a fair hearing However, PEI, has failed to cite any disputed material facts This Board's
9 authority to render summary judgment decisions, where there are no genuine issues of material
10 fact, was affirmed in ASARCO v. Air Quality Coalition, 92 Wn 2d 685, 696-98, 601 P 2d
11 501 (1979) The Administrative Procedure Act, when amended in 1988, contains a specific
12 pronouncement that "[t]he legislature intends that to the greatest extent possible and unless
13 this chapter clearly requires otherwise, current agency practices and court decisions
14 interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in
15 effect "
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18 XVIII

19 Finally, PEI, raises various other issues which are not within the listing of issues in the
20 Pre-Hearing Order The parties are bound by that order, by virtue of WAC 371-08-140(2),
21 which directs, in relevant part, as follows "[t]he issues stated in the prehearing order shall
22 control the subsequent course of the proceedings, unless modified for good cause by
23 subsequent order "
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XIX

Among such issues, is a claim that the order is invalid because it allegedly violates the constitutional provisions against taking of property. PEI's previous motion to amend the Pre-Hearing Order to include this issue was denied on the ground that the Board lacks the authority to address such a constitutional challenge. R/L Associates v. Ecology, PCHB No 90-124 (1991)

XX

PEI has moved to strike the secondary hearing, currently set for October 3-7, 1994. Based on our decision to grant summary judgment and dismiss this case, that motion is moot.

XXI

Based on the foregoing, the Board issues this

ORDER

Summary judgment is granted to Ecology, and PCHB No 93-286 is dismissed.

DONE this 8th day of September 1994

POLLUTION CONTROL HEARINGS BOARD



ROBERT V. JENSEN, Presiding Officer



JAMES A. TUPPER, JR., Member

P93-286J